JAN DE NUL NV & ORS A

v.

INAI KIARA SDN BHD

COURT OF APPEAL, PUTRAJAYA B
MOKHTAR SIDIN JCA
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-1305-2004]
2 MAY 2006 C

CONTRACT: *Arbitration - Arbitration clause - Several causes of action - Tortious claims - Memorandum of Understanding - Interpretation of - Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, s. 6* D

CIVIL PROCEDURE*: Arbitration - Effect of arbitration clause - Stay proceedings - Injunction proceedings - Balance of convenience*

The 1st appellant and the respondent executed a Memorandum of Understanding ('MOU') whereby the 1st appellant provided a E
dredger for the respondent's use, giving the impression to the whole world that the dredger belonged to the respondent being the major shareholder in the 2nd appellant company who was the registered owner of the dredger, although in truth the 1st appellant intended to maintain ownership of the dredger. To facilitate this, F
the 1st appellant made the respondent execute a Trust Deed making the respondent the trustee of the 1st appellant's shares in the 2nd appellant company ('TD') and a Power of Attorney granting the 1st appellant the power to represent the respondent's director in the 2nd appellant company ('PA'). The business G
relationship soured and the 1st appellant alleged a breach of fiduciary duties on the part of the respondent in negotiating the purchase of dredgers from the 1st appellants competitors and a failure by the respondent's to pay accumulated rentals for the use of the dredger ('said sum'). The 1st appellant, prior to terminating H
the MOU, demanded the said sum from the respondent and the respondent asserted ownership of the dredger by virtue of the TD. The 1st appellant then invoked the powers in the PA and on short notice called an Extra General Meeting ('EGM') of the 2nd appellant which culminated in the removal of the respondent's I
director and the sale of the dredger to another associated company of the 1st appellant. The 1st appellant also commenced

A arbitration proceedings in Switzerland pursuant to the terms of the MOU and arrested a sister vessel belonging to the respondent as security for the payment of the said sum. The respondent in turn, commenced a suit against the 2nd appellant for several causes of action followed by *ex parte* applications *vide* encl. 3 (respondent's B injunction to restrain the 2nd appellant from dealing with the ship dredger and an injunction to restrain the 3rd appellant from exercising his rights as the principal director of the 2nd appellant pending the disposal of a suit commenced by the respondent) and encl. 17 (respondent's injunction to restrain the 1st appellant from C issuing any notice of arbitration pursuant to the MOU). The 1st appellant also filed in encl. 35 which was an application for a stay of proceedings whilst the 2nd appellant filed in encl. 11 to contest encl. 3 and together with the 3rd and 5th appellants filed in encl. 31 for a stay of proceedings. In the High Court, the learned judge D allowed encl. 3, dismissed encl. 11, allowed encl. 17 and dismissed encl. 31 and encl. 35. The 1st appellant appealed against the learned judge's decision on encl. 17 and encl. 35 whilst the 2nd appellant appealed against the decision of the learned judge in encl. 3. The 2nd, 3rd and 5th appellant's appealed against the E decision of the learned judge in encl. 35. The sole issue that arose for determination *vide* this appeal was whether s. 6 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('said Act') applied.

F **Held**

Per Richard Malanjum JCA (delivering the judgment of the court):

(1) Clause 13 of the MOU which is clearly a non-domestic clause G when read in conjunction with ss. 2 and 6 of the said Act indicates quite clearly that the New York Convention applies if there is a dispute or difference between the contracting parties provided that the subject matter of the dispute or difference is within the scope of the MOU and is well within H the ambit of the arbitration clause therein. If the dispute between the parties is of a non-contractual nature, it does not come within the scope of the arbitration clause. The suit here was premised on several causes of action which were basically claims under the law of tort and did not come within the I scope of the arbitration clause of the MOU, thus s. 6 of the said Act did not apply. *Hi-Fert Pty Ltd v. Kiukiang Carriers Inc* (foll). (para 20, 25, 26 & 27)

(2) In view of the fact that the claims as pleaded were not within the scope of the terms of the MOU, there was not in fact any dispute between the parties with regards to the matter agreed to be referred and thus the suit fell within the exclusionary limb of s. 6 of the said Act. (para 28).

(3) The 2nd, 3rd and 5th appellants were not even parties to the MOU and the application of s. 6 of the Act demands that they should be parties in the first place. This court could not exercise our discretion and allow a stay of proceedings for them as the issue of stay in respect of the 1st appellant emanated from a statutory provision *ie*, the said Act wherein this court had refused to grant a stay on the basis of the non applicability of the section. (para 29)

(4) Since s. 6 of the said Act was inapplicable, the granting or refusal by the learned judge of the restraining orders applied for was consonant with prevailing legal principles. Any claim pursuant to the MOU should be of a contractual nature whereas the claims in the suit were premised on tort. There were no serious questions to be tried let alone the adequacy of damages or the maintaining of the *status quo*. The balance of convenience tilted in favour of disallowing the application. The learned judge applied the correct tests necessary in finding that there were triable issues involved. (para 33)

[Allowing the 1st appellant's appeal with regards to encl. 17 with 2/3 costs to the respondent and 1/3 costs to the 1st appellant; dismissing the 2nd appellant's appeal with regards to encls. 3 and 11 with costs to the respondent; dismissing the appeal by the 2nd, 3rd and 5th appellants with regards to encl. 31 with costs to the respondent; and dismissing the 1st appellant's appeal with regards to encl. 35 with costs to the respondent.]

Bahasa Malaysia *translation of headnotes*

Perayu pertama dan responden telah menandatangani satu MOU dimana perayu pertama telah bersetuju untuk membekalkan sebuah penggali untuk kegunaan responden, memberi pandangan kepada orangramai bahawa penggali tersebut merupakan milikan responden sebagai pemegang saham utama dalam syarikat responden kedua yang merupakan pemilik berdaftar penggali tersebut walaupun pada hakikatnya perayu pertama bertujuan untuk mengekalkan hakmiliknya terhadap penggali tersebut. Perayu pertama telah menandatangani pertama sekali, sepucuk Suratikatan Amanah dengan responden dimana responden telah dijadikan pemegang

A amanah saham perayu pertama di dalam syarikat perayu kedua ("Suratikatan Amanah") dan kedua, sepucuk surat kuasa wakil dengan responden memberikan perayu pertama kuasa untuk mewakili pengarah responden di dalam syarikat perayu kedua ("PA"). Hubungan perniagaan antara pihak-pihak telah terjejas dan B perayu pertama telah menuduh keingkaran kewajipan fidusiari di pihak responden dalam mengadakan perbincangan untuk membeli penggali daripada pesaingnya dan dalam kegagalan responden membayar tunggakan sewa bagi penggali tersebut ("sewa tersebut"). Sebelum menamatkan MOU tersebut, perayu pertama C telah menuntut sewa tersebut daripada responden dan responden pula telah menegakkan hakmiliknya ke atas penggali tersebut berdasarkan Suratikatan Amanah. Kemudian perayu pertama telah menggunakan kuasanya dibawah PA tersebut dan walaupun singkat masa telah mengadakan suatu mesyuarat agung luarbiasa syarikat D perayu kedua yang telah mengakibatkan penyingkiran pengarah responden dan penjualan penggali tersebut kepada sebuah syarikat bersekutu lain perayu pertama. Perayu pertama juga telah memulakan prosiding timbangtara di Switzerland berdasarkan terma-terma MOU tersebut dan telah menahan suatu vessel E kepunyaan responden sebagai sekuriti pembayaran sewa tersebut. responden pula telah memulakan suatu tindakan terhadap perayu kedua untuk beberapa kausa tindakan dan juga permohonan-permohonan *ex parte* melalui Lampiran 3 (permohonan responden untuk menghalang perayu kedua daripada berurusan dengan F penggali tersebut dan suatu injunksi untuk menghalang perayu ketiga daripada menggunakan kuasanya sebagai pengarah utama syarikat perayu kedua sementara menungu keputusan tindakan yang dimulakan oleh responden) dan Lampiran 17 (injunksi responden untuk menghalang perayu petama daripada mengeluarkan G notis timbangtara berdasarkan MOU). Perayu pertama juga telah memfailkan Lampiran 35 yang merupakan suatu permohonan untuk pergantungan prosiding sementara perayu kedua telah memfailkan Lampiran 11 untuk menentang Lampiran 3 dan bersama dengan perayu ketiga dan kelima telah memfailkan Lampiran 31 untuk H pergantungan prosiding. Di mahkamah tinggi hakim yang bijaksana telah membenarkan Lampiran 3, menolak Lampiran 11, membenarkan Lampiran 17 dan menolak Lampiran 31 dan 35 masing-masing. Perayu pertama telah merayu terhadap keputusan hakim berkenaan dengan Lampiran 17 dan 35 sementara perayu I kedua telah merayu terhadap keputusan hakim berkenaan Lampiran 3. Perayu kedua, ketiga dan kelima telah merayu terhadap keputusan hakim tersebut dalam Lampiran 35. Isu

tunggal yang timbul dalam rayuan ini adalah sama ada s. 6 Konvensyen on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("Akta tersebut") terpakai.

Diputuskan (keputusan bersama yang amat arif hakim-hakim)
Per Richard Malanjum HMR:

(1) Klausa 13 MOU yang jelasnya merupakan suatu klausa bukan tempatan, apabila dibaca bersama dengan kl. 2 dan 6 Akta tersebut dengan jelasnya menunjukkan bahawa Konvensyen New York terpakai sekiranya terdapat perbalahan atau perbezaan pendapat antara pihak-pihak kepada kontrak asalkan asas perbalahan atau perbezaan pendapat tersebut berada di dalam skop MOU dan berada di dalam rangkuman klausa timbangtara berkenaan. Sekiranya perbalahan atau perbezaan pendapat parti-parti bukan berdasarkan kontrak, ianya tidak jatuh dibawah skop klausa timbangtara. Tindakan dihadapan kita adalah berdasarkan beberapa kausa tindakan yang secara asasnya jatuh dibawah tuntuan tort dan oleh itu ianya tidak jatuh dibawah skop klausa timbangtara didalam MOU tersebut, maka s. 6 Akta tersebut tidak terpakai. *Hi-Fert Pty Ltd v. Kiukiang Carriers Inc* (diikuti).

(2) Memandangkan bahawa tuntutan sepertimana diplidkan tidak berada dibawah skop terma-terma MOU, kami berpuas hati bahawa tiada perbalahan antara pihak-pihak berkenaan berdasarkan perkara yang telah dipersetujui akan dirujuk dan oleh itu, tindakan ini jatuh di bawah pengecualian kepada s. 6 Akta tersebut.

(3) Perayu kedua, ketiga dan kelima bukan merupakan parti kepada MOU dan pemakaian s. 6 Akta tersebut memperuntukkan bahawa mereka seharusnya menjadi parti terlebih dahulu. Kami tidak boleh menggunakan budibicara kami untuk membenarkan pergantungan prosiding bagi mereka kerana isu pergantungan berdasarkan perayu pertama timbul daripada peruntukan statutory yakni Akta tersebut dimana kami telah menolak permohonan untuk pergantungan berdasarkan ketidakpakaian sekyen.

(4) Memandangkan bahawa s. 6 Akta tersebut tidak terpakai, kami berpendapat bahawa keputusan yang arif hakim dalam membenarkan dan/atau menolak perintah halangan tersebut adalah berdasarkan dan mengikuti prinsip undang-undang

terkini. Sebarang tuntutan berdasarkan MOU seharusnya berasaskan kontrak tetapi tuntutan di dalam tindakan ini adalah berasaskan tort. Kami gagal untuk melihat persoalan serius yang harus dibentangkan apa lagi kecukupan gantirugi ataupun pengekalan *staus quo.* Imbangan kesenangan berpihak kepada menolak permohonan ini. Kami berpuas hati bahawa yang arif hakim telah menggunapakai ujian yang perlu dan tepat dalam membuat keputusannya bahawa tiada isu yang perlu dibicarakan.

[Membenarkan rayuan perayu pertama atas Lampiran 17 dengan kos 2/3 kepada responden dan 1/3 kepada perayu pertama; menolak rayuan perayu kedua terhadap Lampiran-lampiran 3 dan 11 dengan kos kepada responden; menolak rayuan perayu kedua, ketiga dan kelima terhadap Lampiran 31 dengan kos kepada responden; dan menolak rayuan perayu pertama terhadap Lampiran 35 dengan kos kepada responden.]

Case(s) referred to:

Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc [1998] 159 ALR 142 ***(foll)***

Legislation referred to:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, ss. 2, 6

Other source(s) referred to:

Peter E King, *Contemporary Developments in the Law of International Arbitration in Australia and New Zealand,* Australian Bar Review 1999, vol 18

For the appellant - Rajendran Navaratnam (Rayvatri Rajendra with him); M/s Azman Davidson & Co

For the respondent - Liew Teck Huat (R Thayalan with him); M/s R Thayalan

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D3-22-851-2004]

Reported by Sharmini Pillai

JUDGMENT

Richard Malanjum JCA:

Introduction

[1] On 16 February 2005 after hearing parties to the appeals before us we made the following orders, namely:

a. that the appeal by the 1st appellant against the grant of injunction (encl. 17) to the respondent to restrain the 1st appellant whether by itself or through its director, agent, servants, nominees or otherwise howsoever, from issuing any notice of arbitration pursuant to the memorandum of understanding dated 29 November 2002 (MOU) entered into between the 1st appellant and the respondent is allowed with costs 2/3 to the respondent and 1/3 to the 1st appellant;

b. that the appeals by the 2nd appellant against the grant of injunction (encl. 3) to the respondent to restrain the 2nd appellant from dealing with its main asset, namely, the ship dredger, by way of sale, ownership transfer or divestment of interest thereof and the injunction to restrain the 3rd appellant from exercising his rights as the principal director of the 2nd appellant in any manner until the disposal of the suit no. D3-22-851-2004 (the suit) commenced by the respondent, is dismissed with costs to the respondent and that the appeal by the 2nd appellant against the order of the High Court dismissing its application (encl. 11) to set aside the *ex parte* order obtained by the respondent in relation to encl. 3 is also dismissed with costs to the respondent;

c. that the appeal by the 2nd, 3rd, and 5th appellants against the order of the High Court dismissing their application (encl. 31) for the stay of all proceedings in respect of the suit commenced by the respondent is dismissed with costs to the respondent; and

d. that the appeal by the 1st appellant against the order of the High Court dismissing its application (encl. 35) for the stay of all proceedings in respect of the suit commenced by the respondent is dismissed with costs to the respondent.

[2] The main issue raised by learned counsel for the 1st appellant before us was on the application of s. 6 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (the Convention Act). It was contended that since the law which governed the business relationship between the 1st appellant and the respondent should be the Swiss laws as stipulated in the MOU the arbitration proceeding as envisaged therein would not be a domestic arbitration. As such s. 6 of the Convention Act would be applicable in which case it would be mandatory for the suit to be stayed and the High Court had no discretion on the matter.

A **The Background Facts**

[3] In view of the implication *vis-à-vis* power of the High Court that could arise from the submission of learned counsel it is thus necessary to first outline the factual matrix which gave rise to the B dispute between the parties.

[4] The 1st appellant and the respondent executed the MOU with the intention of giving effect to their disingenuous scheme whereby the 1st appellant would provide a dredger for the respondent to use but which would give the impression to the C whole world, through the use of intermediary companies, that the dredger belonged to the respondent being the major shareholder in the 2nd appellant the registered owner of the dredger. In truth the 1st appellant intended to maintain ownership of the dredger. To achieve the intention the 1st appellant made the respondent D execute a trust deed making the respondent the trustee of the 1st appellant for the shares in the 2nd appellant. As a further step to secure the intention of the 1st appellant the respondent was also made by the 1st appellant to execute a Power of Attorney with powers, *inter alia*, for the 1st appellant to represent the E respondent's director in the 2nd appellant.

[5] Unfortunately the business relationship did not go on smoothly with the 1st appellant alleging breach of fiduciary duties on the part of the respondent for secretly negotiating to purchase F two new dredgers from the competitors of the 1st appellant. The 1st appellant also alleged that the respondent failed to pay for the accumulated rentals on the use of the dredger in the sum of Euro 9,551,929.85.

G **[6]** When the 1st appellant demanded payment for the alleged outstanding rentals prior to the giving of notice of termination of the MOU the respondent asserted ownership by virtue of being the major shareholder of the shares in the 2nd appellant the owner of the dredger.

H **[7]** The 1st appellant then proceeded to invoke the powers contained in the Power of Attorney including the calling of an Extra General Meeting (EGM) of the 2nd appellant on short notice which resulted in the removal of the respondent's director and sale of the dredger to another associated company of the 1st I appellant.

[8] The 1st appellant also applied for and obtained an *ex parte* Mareva injunction on 29 June 2004 pending the non-domestic arbitration proceedings. However on 23 August 2004 that injunction was set aside on the ground that since the arbitration would be conducted outside Malaysia the Arbitration Act 1952 did not apply. A separate appeal is still pending against the setting aside of that injunction and of no concern to us here.

[9] Pursuant to the terms in the MOU the 1st appellant also commenced arbitration proceedings in Zurich, Switzerland *vide* the Request for Arbitration dated 20 July 2004.

[10] In addition to the foregoing actions taken by the 1st appellant a sister vessel belonging to the respondent was also arrested in Singapore as a security for the non-payment of the alleged rentals for the use of the dredger. The arrest was subsequently replaced with a bank guarantee and the vessel released.

[11] Meanwhile the respondent took steps to assert its interests and rights by commencing the suit and followed by *ex parte* applications, *inter alia*, encl. 3 and encl. 17. In turn the 1st appellant, besides contesting the granting of the injunction *inter parte*, filed in encl. 35 for stay of proceedings of the suit while the 2nd appellant filed in encl. 11 to contest encl. 3 and together with 3rd and 5th appellants filed in encl. 31 for stay of proceedings of the suit.

[12] The suit of the respondent is premised on several causes of action, *inter alia*, conspiracy to defraud, breach of fiduciary duties, conversion, the unlawful interference of business interests as well as for a declaration to nullify the EGM of the 2nd appellant held and conducted pursuant to the exercise of the powers in the Power of Attorney. The prayers sought for are:

> (1) A declaration that the Extraordinary General Meeting of the 2nd Defendant held on 12 June 2004 and all acts done pursuant to the resolutions passed at the said Extraordinary General Meeting are unlawful, thus null and void;
>
> (2) Consequently, the nominee of the Plaintiff, Hashim Bin Mohamad Hashim be re-instated as a director of the 2nd Defendant;'

A (3) A declaration that the purported meeting of the Board of Directors of the 2nd Defendant held on 12 June 2004 and all resolution(s) passed and all acts done by the Board of Directors of the 2nd Defendant and/or the 3rd Defendant subsequent to the Extraordinary General Meeting held on 12 June 2004 are unlawful, thus null and void;

B

(4) A declaration that the resolution passed by the Board of Directors of the 2nd Defendant and/or the 3rd Defendant on 12 June 2004 for the transfer of the Plaintiff's shares in the 2nd Defendant in favour of the 4th Defendant is unlawful, thus null and void;

C

(5) Consequently, an order that the 2nd Defendant do transfer the 140,250 shares in the 2nd Defendant in favour of the Plaintiff;

D (6) General Damages against the 1st Defendant for conspiracy to defraud the Plaintiff and/or for breach of fiduciary duties and/or conversion and/or unlawful interference in its business interests;

(7) General Damages against the 2nd, 3rd, 4th and 5th E Defendants for conspiracy to defraud the Plaintiff and/or for breach or breaches of fiduciary duties and/or conversion and/or unlawful interference in its business interests;

(8) Costs of this action be paid by the Defendants to the Plaintiffs;

F

(9) Any other or further relief that this Honourable Court thinks fit and proper to grant.

Before The High Court

G **[13]** In allowing the prayers sought for in encl. 3 and dismissing encl. 11 *albeit* with no order as to costs the learned judge in the court below held that he found serious issues to be tried such as the validity of the EGM in view of the dispute on the notice issued by the 4th Appellant, whether there was conspiracy to H defraud committed by the various defendants (appellants herein) in the suit against the plaintiff (respondent) thereof, whether the termination of the MOU by the 1st appellant was valid and whether the 1st appellant committed breach of fiduciary duties towards the respondent. The learned judge also found that I damages would not be adequate to compensate the respondent should the interim injunction be refused and that on the balance of convenience it would be in favour of granting the order pending the disposal of the suit.

[14] In respect of encl. 17 the learned judge allowed the application with costs on the grounds:

a. that s. 6 of the Convention Act and the Arbitration Act 1952 did not apply to the 2nd, 3rd and 5th appellants simply because they were not parties to the MOU;

b. that the issue of recognition and enforcement of arbitral awards obtained outside of Malaysia did not arise as there was no such arbitration awards presented to the court; and

c. that the suit of the respondent was premised on tort and not pursuant to the terms of the MOU and as such there should be no issue on the application of Swiss laws.

[15] Since encl. 17 was allowed the learned judge found that he had no alternative but to dismiss encl. 31 and encl. 35.

The Appeals

Whether s. 6 Of The Convention Act Applies

[16] Learned counsel for the appellants suggested that this issue should be addressed first as its determination had the bearing on the orders granted by the High Court in encls. 3, 11, 31 and 35. We agreed, hence substantial portion of the submissions of learned counsel for the parties were allotted to this issue.

[17] For clarity and better appreciation of the issue at hand the relevant portions of the MOU are herein reproduced.

[18] Clause 13 of the MOU states:

> 13.1. This Agreement shall be governed by and be construed in accordance with the Swiss Federal Code of Obligations.
>
> d. 13.2. Any dispute or difference arising out of and/or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Zurich, Switzerland. The language of the arbitration shall be English.

[19] The relevant sections in the Convention Act are also reproduced herein for convenience. They are:

Section 2 which reads:

> (1) In this Act, unless the context otherwise requires:
>
> "arbitration agreement" means an agreement in writing, including an agreement contained in an exchange of letters or telegrams, to submit to arbitration present or future differences capable of settlement by arbitration;

Section 6 provides:

> (1) If any party to an arbitration agreement to which the New York Convention applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.
>
> (2) This section applies to any arbitration agreement which is not a domestic arbitration agreement and section 6 of the Arbitration Act 1952 shall not apply to an arbitration agreement to which this section applies.
>
> (3) In this section, "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than Malaysia and to which neither
>
> (a) an individual who is a national of, or habitually resident in, any State other than Malaysia, nor
>
> (b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than Malaysia,
>
> is a party at the time the proceedings are commenced.

[20] Clause 13 of the MOU which is clearly a non-domestic arbitration clause, when read in conjunction with ss. 2 and 6 of the Convention Act, indicates quite clearly that the New York Convention applies if there is a dispute or difference between the

contracting parties provided that the subject matter of the dispute or difference is within the scope of the MOU and is well within the ambit of the arbitration clause therein.

[21] But this is not to say that the mere existence of an arbitration clause, especially non-domestic, would ipso facto entitle a party for a stay of proceedings. In *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc* [1998] 159 ALR 142 the Full Court of the Federal Court of Australia recognized that not all contracts of whatever nature which have arbitration clause 'favours the result that all disputes between the parties to the agreement must fall within the scope of an arbitration clause forming part of it and be determined in accordance with it. The true position is that each case must depend upon the proper construction of the clause understood against the factual matrix in which the contract was entered into. In short, different language reflects different intentions and normally dictates different results. If this is correct, as it is submitted it is, then there is no sound basis for a presumption of one stop adjudication in the interpretation of arbitration clauses.' (See: *Contemporary Developments in the Law of International Arbitration in Australia and New Zealand* by Peter E King – Australian Bar Review 1999 vol. 18).

[22] Briefly the facts of *Hi-Fert Pty Ltd*'s case *(supra)* is that the bill of lading incorporated a clause which stated that 'all disputes arising from' the charterparty or any bill of lading issued under it were to be referred for arbitration in London. When the vessel was about to discharge her cargo, namely, fertilizers from Florida, United States, at the Newcastle Port on the east coast of Australia the Australian Quarantine Inspection Service ordered the vessel not to do so. The reason was that wheat from a prior cargo carried by the vessel had fallen from the beams and other parts of the hold into the cargo. To allow any discharge of her cargo would involve the unlawful importation of wheat, possibly infected by karnal bunt a disease which affects crops grown in the west coast of the United States and Canada. As a result dispute arose between the cargo owners, charterers and shipowners and actions both in rem and in personam were commenced in Australia. One of the claims pleaded was based on false representations allegedly made by the disponent owner which had voyage chartered the vessel to the Australian importer in contravention of the Australian Trade Practices Act 1974. A question thus arose whether Australia was the proper forum for the resolution of the dispute. The Full Court held that all disputes

of non-contractual nature between the parties including the allegations of misrepresentation and breach of the Trade Practices Act should be heard in Australia because they did not fall within the scope of the arbitration clause.

[23] Reverting therefore to the facts and circumstances in the present case we are of the view that it is indeed very much a matter of interpretation of cl. 13, that is, whether the claims as pleaded in the suit come within its ambit and thus triggers the operation of s. 6 of the Convention Act.

[24] Clause 13.2 opens with the phrase: *'Any dispute or difference arising out of and/or in connection with this agreement …'* (emphasis added). Learned counsel for the appellants submitted that the phrase 'arising out of' has been held 'to cover every dispute except a dispute as to whether there was a contract at all'. Unfortunately we were not briefed on the interpretation of that phrase under Swiss law being the chosen proper law for the MOU, save to refer to the advice from their Swiss lawyers that issues brought up in the suit are all arbitral under Swiss law. (See: Dicey and Morris, *The Conflict of Laws*, 12th edn.; *The Law Relating to International Commercial Disputes*, 2nd ed.). Further, it has been opined that such phrase is 'not a term of art or words that have a special or technical significance'. (See: *Hi-Fert Pty Ltd*'s case *(supra)*). The phrase 'arising out of' has also been said to have a wide meaning. However as Emmett J said in *Hi-Fert Pty Ltd*'s case *(supra)* that 'the conduct alleged had no effect on the Charter Contract. The Charter Contract was no more than the background against which the conduct occurred'. Similarly in the present case the alleged conduct of 'conspiracy to defraud' does not have any effect on the MOU. Rather, it is no more than the 'background against which the conduct occurred'.

[25] Hence, with respect, we are unable to agree with learned counsel for the appellants. Surely it would have been beyond the contemplation of the parties when they signed the MOU to include as arbitral any issues irrespective of whether they could be within the ambit of the terms or the working of the MOU. We are also of the view that it cannot be correct to say that once there is an arbitration clause in an agreement the parties thereto are obliged to go for arbitration to resolve all their disputes irrespective of their nature. We are thus inclined to follow the approach taken by the Full Court in *Hi-Fert Pty Ltd*'s case *(supra)* in that if the dispute between the parties is of non-contractual

nature it does not come within the scope of the arbitration clause. In that case the claims as pleaded included misrepresentation and breach of the Trade Practices Act 1974 and they were not considered as contractual in nature.

[26] So too in this present case where the suit is primarily premised on several causes of action, *inter alia*, conspiracy to defraud, breach of fiduciary duties, conversion, the unlawful interference of business interests as well as for a declaration to nullify the EGM of the 2nd appellant held and conducted pursuant to the exercise of the powers in the Power of Attorney. In our view these are basically claims under the law of tort and do not come within the scope of the arbitration clause of the MOU. Indeed the prayers sought for in our view are very much related to the allegation of conspiracy to defraud the respondent. There is no prayer seeking for specific performance of any of the terms in the MOU.

[27] Thus, we are in agreement with the conclusion of the learned Judge in the court below that s. 6 of the Convention Act does not apply.

[28] Additionally in view of the fact that the claims as pleaded are not within the scope of the terms in the MOU we are satisfied that 'there is not in fact any dispute between the parties with regard to the matter agreed to be referred' and thus the suit falls within the exclusionary limb of s. 6 of the Convention Act.

[29] The case for the 2nd, 3rd and 5th appellants is made weaker by the fact that they are not even parties to the MOU. The application of s. 6 demands that they should be parties in the first place since it opens with the sentence 'If any party to an arbitration agreement to which the New York Convention applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement,'. There is also no reason for us to exercise our discretion to allow stay of proceeding for the 2nd, 3rd and 5th appellants since in the first place the issue of stay in respect of the 1st appellant emanates from a statutory provision namely, s. 6 of the Convention Act. It would be glaringly inconsistent if we were to exercise our discretion in favour of allowing stay for them while refusing for the 1st appellant on the basis of the non-applicability of the section.

[30] In the upshot the applications for stay (encl. 31 and encl. 35) which were premised only on the applicability of that section must fail.

The Grant Of Interim Injunction Orders

[31] In view of our foregoing conclusion on the non-applicability of s. 6 in this case we need only to consider whether the grant or refusal by the court below of the restraining orders applied for was in consonant with the prevailing legal principles. This is primarily involving encl. 17, 3 and 11.

[32] We first deal with encl. 17 which was allowed by the court below.

[33] Since we have concluded that the claims as pleaded in the suit of the respondent do not come within the ambit of the arbitration cl. 13.2 of the MOU the commencement or continuance of the arbitration proceedings as envisaged would be quite a separate exercise. Just because the MOU or its contents could emerge as part and parcel of the body of evidence that might be adduced during the hearing of the suit should not be construed as having the effect of providing avenues for probable conflicting findings by two sets of arbiters on same issues. It should be noted that any claim pursuant to the MOU is of contractual nature whereas the claims in the suit are premised on tort. As such we are unable to see any serious question required to be tried, let alone the issues of adequacy of damages and the maintenance of *status quo.* The balance of convenience should also tilt in favour of disallowing the application. We find therefore no reason to restrain the 1st appellant from proceeding to invoke the arbitration clause in the MOU. Accordingly we allowed the appeal by the 1st appellant against the grant of injunction to the respondent *vide* encl. 17.

[34] Enclosures 3 and 11 could be dealt together as the first was an application for restraining order by the respondent while the second was an application to set aside the *ex parte* order granted under the first application.

[35] We have read and reread the reasoning of the learned High Court in allowing the application by the respondent in encl. 3 and we are not convinced that he had committed any error of law in so doing. He had applied the correct tests necessary in an injunction application. The learned judge found that there were

triable issues, *inter alia*, whether the EGM was valid, whether there was conspiracy to defraud committed by the appellants and whether there was breach of fiduciary duties by the 1st appellant towards the respondent.

[36] In allowing the order prayed for in encl. 3 the learned High Court Judge found it inevitable that encl. 11 had to be dismissed since it was an application to set aside the *ex parte* order given under encl. 3. We agree with the conclusion of the court below.

Conclusion

[37] Based on the foregoing reasons we therefore allowed the appeal against the decision of the court below allowing the application of the respondent in encl. 17. We dismissed the appeal against the decision of the lower court allowing encl. 3 and dismissing encl. 11.

Other Issues

[38] There were also other issues raised by both sides. In particular learned counsel for the respondent submitted that the appeals of the appellants were incompetent as only one notice of appeal was filed although there were several orders made by the court below pursuant to the various applications.

[39] We did not entertain those technical objections as we were not satisfied that the respondent had shown any prejudice by the filing of the single notice of appeal. In any event all the matters before us emanated from the same suit and the parties were common as well.